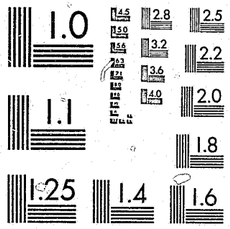

REPORT ON THE MEDIATION PROGRAM IN THE EASTERN DISTRICT OF MICHIGAN

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In November of 1981 the federal court in Eastern District of Michigan adopted a local rule that permits a judge to refer diversity cases to a mediation panel, and to impose certain costs as a penalty if a resulting trial does not improve on the award suggested by the mediation panel. This report (1) describes the mediation rule, (2) presents the findings of interviews with judges who have referred cases to the mediation program, and (3) offers a brief discussion of the opportunities for an evaluation of this program.

1. Background and Description of the Mediation Program.

The federal court adopted the mediation program in response to increased filings of diversity cases in the district. Of particular concern were increases in the number of diversity cases removed from the state courts. As indicated in Table 1, during the decade of the 1970s diversity filings increased from 593 cases in 1971 to 1317 cases in 1980. During this period the percentage of diversity cases removed from state court steadily increased from 14% in 1971 to 43% in 1980.[1] The mediation program was intended to encourage settlement of diversity cases, thereby reducing the burdens of trial for the court.

The federal court mediation program relies upon a program that has been functioning successfully in the state court system for several years. In 1978 the Third Judicial Circuit Court of the State of Michigan strengthened an existing mediation program,

and appears to have achieved some success in overcoming similar state court problems of increased filings and delay. The federal court mediation program is patterned after the state court program and refers cases to the same mediation panels.

The character of the mediation panels is particularly noteworthy. The mediation panels are composed of three attorneys, one selected by a representative of the plaintiff bar, one selected by a representative of the defense bar, and a neutral panel member selected by the Chief Judge of the Circuit Court. Panel members are selected from the Mediation Tribunal Association, an association composed of members of the local trial bar who have a minimum of five years of litigation experience in the state court system. This experience requirement for mediators is thought to be a key factor in the success of the program.

The amount of time spent by the mediation panel considering the merits of an individual case is more limited than in other mediation programs. The mediation panel hears a fifteen minute presentation by an attorney for each party and reviews documentary evidence concerning liability and damages. The panel does not accept personal testimony by any party, and spends only a limited amount of time exploring strengths and weaknesses of the case and initiating negotiations between the attorneys. After a brief private conference, the mediation panel presents the attorneys with an estimate of the settlement value of the claim.[2] Each of the parties must either accept or reject this award through written notice to the Tribunal Clerk of the

Mediation Tribunal Association within 40 days; failure to respond is construed as acceptance of the award. At the end of this period the clerk notifies each party of the action of the other. If the mediation award is not rejected by any of the parties within 40 days, a judgment is entered by the court in the amount of the award. If any party rejects the mediation award, the case proceeds to trial. The cost of the mediation is paid by a $75.00 fee assessed to each of the parties for each award requested.

In November of 1981, the federal district court, under the authority of local rule 32, began referring some diversity cases to the mediation panels. Under the local rule of the federal court, any diversity case seeking money damages as the exclusive remedy may be referred for mediation either by stipulation of the parties, by motion of one party with notice to the other party, or on the court's own motion. The federal local rule follows as closely as possible the state mediation rule. Federal cases are heard by the same mediation panels that hear the state cases, and parties are subject to the same penalties for refusing a reasonable mediation award. If the mediation panel's award is unanimous, the parties are subject to the following penalties:

(a) If the defendant accepts the award and the plaintiff rejects it, the plaintiff must obtain a verdict that exceeds by 10% the amount of the award, plus interest, plus costs from the date of the filing of the complaint to the date of the award, to avoid payment of "actual costs" to the defendant.

(b) If the plaintiff accepts the award and the defendant

rejects it, the defendant must obtain a verdict in an amount which, when interest on the amount and costs from the date of filing of the complaint to the date of the award are added, is more than 10% below the amount of the award, to avoid payment of "actual costs" to the plaintiff.

(c) If both parties reject the award, then either (i) each party bears its own costs if the verdict is within 10% of the amount of the award plus interest plus costs from filing to the award, or (ii) the defendant pays "actual costs" if the verdict is more than 10% above the award when interest and costs are added, or (iii) the plaintiff pays "actual costs" if the verdict is more than 10% below the award when interest and costs are added.

"Actual costs" are those costs and fees taxable in any civil action and, in addition, an attorney fee for each day of trial as may be determined by the court.

Very little systematic information about the mediation program has been developed.[3] Currently, we know only the number of cases referred to mediation and how they were disposed of. In 1982, a total of 388 federal cases were referred to the Mediation Tribunal Association. Of these, in 128 cases the mediation process was unnecessary, because of either settlement, postponement, or some other difficulty with the case. Of the remaining 260 cases, in 76 (29%) the mediation award was accepted and in 184 (71%) the award was rejected.[4] Of course, it is

likely that many of the 184 cases in which the award was rejected in fact settled before trial.

2. The Role of the Mediation Program in Federal Court.

In February of 1983, interviews were conducted with ten of the fifteen judges in the Eastern District of Michigan to determine how they have used the mediation program and their impressions of its effects. Three of the judges not interviewed sit in courts outside of Detroit and have limited opportunity to refer cases to the mediation panels. The two judges in Detroit who were not interviewed were away from the court during the week that the interviews were conducted. The interview explored the way that the cases are selected for referral to mediation, the imposition of the cost-shifting sanctions, and impressions of the effects of the mediation program. Because several of the interviews were cut short by the press of other business, some of the topics were omitted in some of the interviews.

Referral Practices. There are two typical methods of referring eligible cases to mediation. Approximately one-half of the judges refer cases to mediation on motion of the court as part of a routine system for processing the early stages of a case. Frequently the eligible cases are identified soon after filing by a courtroom deputy. If the attorneys object to mediation, most of the judges will defer to the wishes of the attorneys. However, a few judges have a strict rule that all eligible cases are referred to the mediation program.

The remainder of the judges more frequently rely on referral

through stipulation of the parties. While these judges may encourage mediation, in general they appear to pay greater deference to the wishes of the attorneys. In general, these judges refer fewer cases to mediation, sending over only cases in which they expect the mediation panel to be skilled in assessing, such as cases involving liability for personal injury.

The referral to mediation is typically included in the pretrial order that sets the dates for status conferences, discovery and motion cutoff, and trial. This is accomplished either through a standing order or at the initial conference that establishes the schedule of events in the case. All judges send cases to the mediation panel after completion of discovery. Most of the judges set the mediation date to follow the close of discovery, two judges set mediation for the close of motion practice. One judge mentioned that the Mediation Tribunal Association has requested that cases not be sent over before the close of discovery, since without discovery there is not sufficient information for an accurate assessment of the value of a claim.

There have been some changes in referral practices since the early days of the mediation program. Several of the judges who initially relied upon stipulations have begun to rely more regularly on referral by the motion of the court, and have included this referral as part of the routine processing of eligible civil cases. As a result, these judges are now referring a greater proportion of their eligible cases to the mediation program. Several judges also have changed the timing

of the referral, shifting the referral from early in the pretrial process to the close of discovery. However, there continues to be considerable variation among judges in the way cases are referred to mediation, in the deference accorded to the wishes of the attorneys, and in the proportion of eligible cases referred to mediation.

Imposition of Sanctions. As indicated above, the mediation rule permits shifting of "actual costs" including attorney fees for trial days if the award at trial does not improve on the award of the mediation panel. Since few diversity cases go to trial, there has been little experience with the imposition of cost-shifting sanctions for verdicts that fail to improve on the mediation offers. Six of the ten judges participating in the interviews recalled hearing no cases that were eligible for the imposition of the sanctions. All of these judges indicated that they would impose the sanction if they encountered an eligible case.

Four of the judges had heard cases that were eligible for the imposition of the sanction. Though language in the rule can be interpreted to require the imposition of sanctions in eligible cases,[5] in practice this appears to be a matter within the discretion of the judge. In fact, two of these judges did not impose the sanctions. In each case the attorney for the party to be compensated did not seek to have the sanction imposed. Both judges mentioned their reluctance to shift costs on a motion of the court. Cost-shifting is not seen by these judges as a mechanism to be imposed on the court's own authority in order to

deter future trials that fail to improve on settlement offers. Rather, the cost-shifting sanction is seen as a mechanism for compensating the party who has been needlessly put to the expense of a trial, and the judges who did not impose the sanctions deferred to the wishes of the party who was wronged. Furthermore, there is a practical problem in imposing the sanction on the court's own motion; by the time the imposition of sanctions becomes appropriate the judge is unlikely to recall the details of the mediation award unless reminded by one of the parties.

Two of the judges had imposed the cost-shifting sanctions. In two cases heard by one judge the wronged party requested the sanction. The initiation of the sanction in the case heard by the other judge is uncertain. In each case the amount of the attorney's fees were negotiated by the parties with little judicial involvement.[6] Attorney fees were $250/day for a total of approximately $2000 in two cases, and $500/day for a total of approximately $1500 in another.

Several judges expressed concern about the authority of the court to impose cost-shifting sanctions. They suggested that this uncertainty is why some judges encourage stipulation by the parties in referring cases to mediation, rather than rely on the court's own motion. The stipulation process strengthens the opportunity for imposing the cost-shifting sanction since the parties have agreed to submit to the mediation process.

Effects of the Mediation Program. All of the judges were asked for their observations concerning the effects of the mediation program. Several were reluctant to comment on the effects of the program, mentioning that they did not have sufficient information to make such a determination. Since the program has been in place just over a year, and since the program applies to a relatively small portion of the caseload of each judge, the opportunities for individual judges to assess the effects of the program have been limited. Of those who had an impression of the effects of the mediation program, most agreed that the program reduces the number of trials of diversity cases by increasing the proportion that settle. Most also agreed that the program conserves the resources of the court by limiting the amount of time spent by judges on such cases, and reduces the cost of litigation to the parties in a substantial number of cases by avoiding unnecessary trials. However, most of the judges thought that the mediation process extends the average time from filing to disposition because of the additional period required for the mediation.[7] In summary, the impressions of the effectiveness of the mediation program are favorable, though a number of judges are suspending judgment until more systematic information becomes available.

In general, the judges attributed the success of the program to the generation of an objective valuation of a claim, though they agreed that the court's authority to impose sanctions should be retained as part of the program. The award of the mediation panel has benefits even if it is rejected by one or more of the

parties. Almost all of the judges mentioned the importance of the mediation award as a starting point in settlement discussions. This is particularly helpful to attorneys who are inexperienced in placing value on personal injury cases, the most common type of case referred to mediation. The mediation award aids the judges in participating in settlement negotiations, especially in cases destined for jury trials where the judges are less reluctant to participate in the settlement process. Also, several judges mentioned that the mediation award may be useful to an attorney who is encouraging a reluctant client to settle.

The judges were asked if the mediation program appears to be more successful for some kinds of diversity cases than for others. Mediation seems most successful in small personal injury cases, especially those with inexperienced attorneys. Mediation seems less successful with large cases, cases with multiple defendants, and cases with indigent or "uncollectable" plaintiffs.

The judges were asked what kind of cases other than diversity cases would benefit from referral to the mediation program. The most common suggestions were federal tort claims and other simple federal question cases that may be within the experience of the panel members. There have been several instances in which cases with federal question jurisdiction have been referred to the panel through stipulation of the parties, though these instances are too few to permit systematic examination. There is a minor difference of opinion about the importance of restricting the mediation program to cases that

seek only monetary relief. Most of the judges said that issues of equitable relief are not suitable for determination by such a panel. However, two of the judges indicated that equitable relief could be accommodated if the remedy sought is relatively simple.

No specific adverse effects of the mediation program were mentioned, other than the delay for the period during which the case is referred to the mediation panel. On occasion parties have sought mediation for the purpose of postponing a trial, though this is less of a problem if the dates for referral to mediation and the trial dates are set at the same time. Several judges questioned the accuracy of the valuation of claims by the mediation panel. They suggested that the awards set by the mediation panel are higher than juries in federal court typically award, though the mediation awards may be consistent with jury awards in the state court.

Finally, the judges were given a list of case management and settlement practices and asked to indicate how frequently they employ each of the techniques. These questions are part of an effort to develop a questionnaire that will permit the identification of various "styles" of case management and settlement involvement. The preliminary findings seem promising and analysis is continuing. Some problems were encountered as judges attempted to describe their practices in terms of the frequency scale that was provided (i.e., never, very seldom, regularly, almost always, always). Also, it may be necessary to distinguish between settlement practices in bench and jury trials. The lists

of practices and frequencies of responses are presented in Table 2 and Table 3.

3. Opportunities for Further Research.

While conducting the interviews, additional information was gathered to aid us in determining whether a more rigorous examination of the mediation program is appropriate. There is some interest in documenting any effects of the program. The recent report on the district by the Office of Management Review suggested an evaluation of the program, including "the compilation of information on the percentage of awards accepted and rejected and the number of cases that actually settle before trial." The Research Division of the Federal Judicial Center was identified as a likely resource to assist in such an evaluation.[8] Also, most of the judges were interested in evidence concerning the effect of the program on settlement rates, and the relationship between the mediation award and the final settlement value.

Evidence of the effect of the program may be drawn from records of past cases, comparing the disposition of cases that were referred to mediation with those eligible cases not referred.[9] However, an accurate assessment of the effects of the mediation program will be difficult. Consider the problem of determining the effect of the program on a group of 100 diversity cases filed at the same time. Even without the mediation program, approximately 90 will settle without trial. If the mediation program is successful, it may result in settlement of

five of the remaining ten cases. This would be a remarkable achievement, reducing the burden of trial by one-half. However, it will be difficult to detect such an effect in the midst of the settlement activity that would occur without the mediation program.

Two refinements are necessary before such an evaluation would have a reasonable chance of success. First, the evaluation should be restricted to those cases that continue past the close of discovery. Eliminating cases that settle prior to that time will remove a source of error and confusion, and will focus the inquiry on the pretrial period that is most likely to demonstrate the results of mediation.[10] Identification of this group of cases will require examination of the case file for each diversity case in which a pretrial conference was conducted.[11]

Second, the effect of the program must be analyzed separately for each judge. Since some judges have made infrequent use of the program, it will be misleading to examine only the overall proportion of diversity cases that settled before and after the mediation program became available.[12] Analyzing the effectiveness of the program separately for each judge will offer a more precise measure, since the settlement rates of those judges who have used it frequently can be compared with the rates of those who have used it sparingly.

Finally, there is a particularly vexing problem concerning separation of the effects of the mediation program from the effects of other case management and settlement practices of the individual judges. Those judges who are more active in

encouraging settlement also refer greater proportions of their diversity cases to mediation. If such settlement-oriented judges have a higher proportion of cases that settle, it may be due to the mediation program, or it may be due to the judge's style of case management or involvement in settlement.[13] Even with the most sophisticated research design we will be unlikely to obtain a separate estimate of the effect of the mediation program, and measure only the cumulative effects of a variety of case management and settlement practices, including mediation.[14]

Interviews with attorneys offer another source of information about the mediation program. When the judges were asked what kind of information would aid them, a number of judges mentioned issues that have to do with perceptions of the attorneys. Such questions as, "Do the attorneys think the mediation program is effective in bringing about settlement?"; "How much time is spent preparing for mediation?"; and, "How does the award affect subsequent settlement negotiations, and relations between the attorney and client?"; were commonly mentioned as issues that would be helpful to the judges in their assessment of the program. Much of this information can be gathered by telephone interviews.[15] A similar survey of attorneys who have participated in mediation through the state court is being conducted by the Action Commission of the American Bar Association. However, information from interviews will be limited to attorneys impressions of the program, and will not permit an objective demonstration of an effect of mediation. Also, it is likely that the attorneys' impressions of the

mediation program will not be limited to their experiences in federal diversity cases, but will be influenced by their experiences litigating in the state court.

4. Conclusion.

The mediation program in the Eastern District of Michigan is the only program of its kind in the federal court system, and represents one of the few active programs of alternative dispute resolution in the federal system. It was first established in the state court system, then adopted by the federal court for diversity cases. Since the federal court was not involved in the initiation or development of the program, its suitability for extension to other federal districts is uncertain.

Most judges believe that the program is effective in increasing the likelihood of settlement of diversity cases, though some are suspending judgment until the program has been in place for a longer period. There has been limited experience with the cost-shifting sanction, and a difference of opinion exists concerning how the sanctions are to be imposed. More cases are being referred to mediation as the judges become more familiar with it.

A rigorous examination of case records to obtain an objective measure of the effect of the program on settlement rates is possible, though technical problems exist in developing the proper comparison groups. Interviews with attorneys who have participated in the program will provide impressions of its effect on settlement, and will answer a number of questions that

are of concern to the judges. However, the impressions of attorneys are unlikely to be limited to their experiences with diversity cases, and will not provide the objective examination of the program that may be desired. Before further research is undertaken, careful consideration of the goals of such a study will be required.

FOOTNOTES

1. The increase in the proportion of diversity cases removed from the state court seems to be related to a perception of differences in jury awards in the federal and state courts. In informal conversations, both judges and attorneys mentioned that attorneys representing defendants in personal injury claims remove eligible cases to the federal court as a standard practice, since federal court juries are seen as being less likely to find liability and less generous in awarding damages.

2. The entire process requires approximately forty-five minutes. The limited amount of time spent in aiding the attorneys in negotiation has caused some to suggest that the program can be more accurately described as a "valuation" program, intended to place an accurate settlement value on a claim, rather than a traditional mediation program, intended to bring the parties to a mutually satisfactory agreement.

3. Recently the state court mediation program has received a great deal of attention. Several articles concerning the program have appeared in local bar publications. The Action Commission of the American Bar Association is developing a study of the role of the mediation program in the state courts. This study will describe the mediation process and examine the effectiveness of the penalty provisions in encouraging settlement before trial. The Action Commission study will be restricted to mediation in the state court system.

4. In the state circuit court system the mediation program also aids in screening cases for remand to a lower court if they do not meet the jurisdictional amount. According to the annual report of the Mediation Tribunal Association, in 1981 the Wayne County Circuit Court forwarded a total of 7,341 civil cases to the mediation panel. Of these, 21% settled before or at mediation, 23% accepted the award of the mediation panel, and 19% were remanded to a lower court since the award of the mediation panel was less than $10,000 and was not accepted by the parties. In other words, 63% of the cases sent to the mediation panel were disposed of, either by settlement, mediation, or the remand process, leaving only 37% of the cases requiring further action by the Wayne County Circuit Court. Furthermore, the report notes that in those cases returned to the court, a majority were subsequently settled prior to trial "for an amount equal to or very near the mediation award." The authors of the annual report also credit the mediation rule with reducing the elapsed time from case filing to trial date. From February, 1979, the date the revised mediation program

was implemented, to January, 1982, this time was reduced by 18 months, from 48 months to 30 months.

5. Though the language differs across the subsections, local rule 32.10 anticipates that the penalties will be imposed in the eligible cases:

(c) If . . . the defendant accepts the evaluation but the plaintiff rejects it and the matter proceeds to trial, the plaintiff must obtain a verdict in an amount which . . . is more than 10 percent greater than the evaluation in order to avoid the payment of actual costs to the defendant.

(d) If . . . the plaintiff accepts the evaluation but the defendant rejects it and the matter proceeds to trial, the defendant must obtain a verdict in an amount which . . . is more than 10 percent below the evaluation or pay actual costs.

Subsection e is more complicated, dealing with the circumstances in which each party rejects the evaluation, but in referring to the party who failed to improve on the mediation offer uses the phrase, "shall be taxed actual costs."

6. In each case the judge ratified the agreement reached by the parties. There is very little information concerning such costs. When other judges were asked how they would determine such costs, most indicated that they would contact the state circuit court to learn what standards have been used.

7. Approximately three months pass from the time a case is referred to the Mediation Tribunal Association to the time it is returned to by the court for further action. However, no resources of the court are expended during this period. Note that in the state court system, the introduction of the mediation program reduced the disposition time for all cases, in spite of this delay. However, the disposition times in the state court were considerably longer than in the federal court.

8. The management audit also suggested that a statistical reporting system be developed for each of the judges, indicating the number of cases referred to mediation, the number of awards accepted, and the number of cases settling before trial. A special record system is being designed by the Innovation and Systems Division to accommodate this need.

9. The case files and other records in the district are accurate and well-maintained. Two separate lists of cases referred to mediation are kept, one in the clerk's office and another in the offices of the Mediation Tribunal Association.

10. Since the cases are referred to mediation at the close of

discovery, it is unlikely that there will be any effect of the program prior to that time. Of course, if the mediation program results in postponement of settlement activity to gain the benefit of information from the mediation panel, this adverse effect of the program will not be detected.

11. Identifying the group of cases that survive to the close of discovery will be time-consuming. The records of the Administrative Office can be used to identify the cases in which there is at least one pretrial conference, but many cases settle between the first pretrial conference and the close of discovery. A quick examination of the case files revealed that almost one half of the cases that we had identified from AO records as being candidates for the mediation program (because they had settled after the first pretrial conference) in fact had settled prior to the close of discovery. The only way to identify the group of cases that were eligible for mediation is to examine the files of each case to determine where in the pretrial process it terminated. Of course, examination of the case file will also identify those diversity cases that were ineligible for mediation because they sought nonmonetary relief, though preliminary investigation revealed that this will be a rare occurence.

12. Also, an effective program might not be detected if the number of diversity filings has changed during this period.

13. The questionnaire exploring case management and settlement practices has the potential to sort out such effects. However, the preliminary versions of the questionnaire are not up to the task. Much more testing must take place before the specific effects of mediation can be separated from the other practices.

14. One judge questioned the wisdom of such an evaluation, expressing concern that the less rigorous research designs likely to be employed may not be sufficiently powerful to capture the effects of the program. Several judges expressed concern that such a study may be premature, since the program has been in place little more than a year and case referral practices are still changing.

15. The names, addresses and telephone numbers of attorneys who have appeared before the mediation panels after being referred there by the federal court are readily available through the records of the Mediation Tribunal Association.

TABLE 1: CIVIL FILINGS IN THE EASTERN DISTRICT OF MICHIGAN

Fiscal Year	Civil Cases	Diversity Cases	Removed From State Court	Percent Diversity Removed From State
1971	1840	593	82	14%
1972	1932	607	108	18%
1973	2021	628	139	22%
1974	2198	659	193	29%
1975	2541	890	287	32%
1976	2990	926	310	33%
1977	3392	953	333	34%
1978	3531	1019	372	37%
1979	4930	1137	441	39%
1980	5459	1317	570	43%

TABLE 2: CASE MANAGEMENT PRACTICES

	NEVER	VERY SELDOM	REGULARLY	ALMOST ALWAYS	ALWA
A. Setting and holding a firm trial date early in the litigation	2	4	1	1	2
B. Establishing time schedules to regulate and expedite the discovery process.	--	--	1	2	7
C. Permitting magistrates or other court officials acting under my supervision to establish time schedules to regulate and expedite the discovery process.	8	1	1	--	--
D. Holding a preliminary pretrial conference shortly after the case is filed to discuss the scope and extensiveness of discovery as well as other pretrial activities.	--	1	3	--	6
E. Permitting a magistrate or another court official acting under my supervision to hold a preliminary pretrial conference shortly after the case is filed to discuss the scope and extensiveness or discovery as well as other pretrial activities.	9	1	--	--	--
F. Placing limits on the scope, duration, and extensiveness of discovery, without waiting for party-initiated requests.	--	3	3	2	2
G. Holding regularly scheduled hearings or conferences to follow the progress of the case toward trial and to monitor discovery activities.	1	2	1	2	4
H. Permitting magistrates or other court officials acting under my supervision to hold regularly scheduled hearings or conferences to follow the progress of the case toward trial and monitor discovery activities.	9	1	--	--	--
I. Holding a formal pretrial or settlement conference as a case approaches the date of trial.	1	1	--	2	6

TABLE 3: SETTLEMENT PRACTICES

	NEVER	VERY SELDOM	REGULARLY	ALMOST ALWAYS	ALWAYS
A. Assessing the costs of empaneling a jury against parties or counsel who unreasonably delay settlement until the day of the trial.	9	1	--	--	--
B. Refusing to grant postponements or recesses to discuss settlement once the day of the trial has been reached.	--	2	2	2	4
C. Indicate willingness to be present during settlement discussions.	2	--	1	3	4
D. Initiating settlement discussions once the parties have had an opportunity to evaluate the case.	3	--	1	5	1
E. Introducing previously tried cases during settlement discussions as a device to put the current case in better perspective.	3	1	5	1	--
F. Undertaking an insurance-like analysis of liability and damages during the settlement discussions.	3	5	1	1	--
G. Suggesting a fair settlement figure during discussions.	3	3	3	--	1
H. Including the actual parties in the settlement discussions (along with attorneys).	2	4	--	3	1
I. Meeting separately with each side to explore the possibilities and terms of settlement.	3	1	1	1	4

END